

*Please return to: [Insert Permittee's mailing address]*

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

STORMWATER FACILITY AGREEMENT  
AND COVENANTS (Residential Version)

**THIS AGREEMENT ("Agreement")** is made among \_\_\_\_\_  
("Permittee"), \_\_\_\_\_ ("Association"),  
and the City of Durham, a North Carolina municipal corporation ("**City**") and is effective on the date of its recordation  
in the Durham County Register of Deeds.

**1. Background and Definitions**

a. Scope: Purpose. Permittee owns and is developing real property (the "Property") that, upon completion of development, will contain one or more constructed stormwater improvements (the "Facility/ies") to control stormwater runoff and pollution from the Property. After construction, Permittee will transfer portions of the Property, including the Facility/ies, to the Association, which will be responsible for perpetual maintenance, annual inspection, repair, reporting to the City, and reconstruction of the Facility/ies. This Agreement sets forth Permittee's obligations to construct the Facility/ies in accordance with the obligations of this Agreement and other City Requirements, inspect and certify the Facility/ies, pay certain monies toward the replacement of the Facility/ies, and establish the Association and its obligations, through legally binding covenants. This Agreement also sets forth the responsibilities of the Association with regard to the Facility/ies. This Agreement is appurtenant to and runs with the Property, described in Section 1(b) below. The purpose of this Agreement is to ensure construction of the Facility/ies per City Requirements, to ensure the perpetual inspection, maintenance, repair, and reconstruction of the Facility/ies by Lot Owners within the Property, and to allow the City in its discretion to enforce these requirements, if necessary, for the benefit of the Lot Owners collectively, and the public at large.

b. Property to which this Agreement Attaches. The Property is that property shown on the plat entitled \_\_\_\_\_ and recorded at **Plat Book** \_\_\_\_\_, **Page** \_\_\_\_\_, Lots \_\_\_\_\_ (*instructions to staff – after the word "lots" indicate either "all" or identify by number the specific Lots subject to this Agreement.*), Durham County Register of Deeds. It is generally located \_\_\_\_\_ and \_\_\_\_\_ **of the intersection of** \_\_\_\_\_ **and** \_\_\_\_\_ **and is commonly known as** \_\_\_\_\_. It is part or all of the property acquired by Permittee in deeds recorded in **Deed Book** \_\_\_\_\_, **Page** \_\_\_\_\_, Durham County Register of Deeds. The Facility/ies that must be constructed, certified, maintained, inspected annually, repaired, and reconstructed pursuant to this Agreement are located on the following lots on the above described plat and are of the following approximate size and type (*SW staff: describe below each Facility by its general type such as "wet detention facility" or "wetlands", the projected approximate size for each, and identify the lot on the above-described plat where each Facility will be*

located):

i.

ii.

iii.

c. Background. This Agreement is intended to comply with City ordinances and policies that implement State and Federal laws that require that development contain stormwater facilities to control runoff and pollution and that such facilities be perpetually maintained and reconstructed.

d. Relationship to Ordinances, Policies, and Guidelines. This Agreement supplements other City Requirements. If this Agreement and such City Requirements conflict, the stricter requirements shall control.

e. Definitions. The terms in this Agreement have the following definitions:

"Association" and "HOA" (the terms being used interchangeably) means the association that has executed this Agreement that was formed by Permittee in compliance with statutory requirements (which may include the North Carolina Nonprofit Corporation Act, NCGS Chapter 55A, and the North Carolina Planned Community Act, NCGS Chapter 47F and successor statutes) for the purpose of owning and maintaining real property and improvements thereon intended for the common benefit of - Lot Owners within the Property-. In the absence of the Association, for whatever reason, the Lot Owners, collectively, shall be considered the Association and shall be responsible for the Association's obligations under this Agreement. The "Association" may also include additional associations or lot owners not shown on the Property where such associations or owners have joined, or have purchased subject to, the obligations of the Association in this Agreement.

"City Manager" means the Durham City Manager or a Deputy City Manager to whom authority to execute contracts has been delegated.

"City Fund" means "Stormwater Facility Replacement Fund" as defined below.

"City Requirements" means the legal obligations and standards set forth in City ordinances, and written City and Public Works policies, guidelines, manuals, protocols, standards, and/or handbooks, as such may be amended from time to time.

"Director" means the City's Director of Public Works or the Director of a successor department to the Department of Public Works and any Person to whom the Director's duties have been delegated pursuant to City Requirements.

"Facility/ies" means one or more stormwater control device(s) and/or areas that are created for the purpose of detaining and/or treating stormwater. Such facilities may include but are not limited to dry detention areas, wet detention ponds, wetlands, level spreaders and all associated constructed and natural features that allow such devices or areas to function as intended.

"Lot" means a lot within the Property, whether developed or undeveloped.

"Lot Owner" means the legal owner of any fee simple interest in a Lot.

"Permittee" means the party that owns the Property at the time of recordation and that executes this Agreement and successors in interest who take all or a portion of the Property. The term does not include any Person that has only a beneficial interest in the Property. The term also does not include a Person who owns one Lot zoned for single family use where such owner does not own other lots.

"Person" includes but is not limited to natural persons, business trusts, joint ventures, governments, governmental subdivisions, governmental agencies, firms, corporations, limited liability companies, associations, partnerships, and other legal entities.

"Property" is the land described in Section 1(b) above which is owned by the Permittee and which will be served by the Facility/ies described herein.

"Site" means a Lot or parcel within the Property which contains at least one Facility. Where there are multiple Facilities, there shall be multiple Sites.

"Stormwater Facility Replacement Fund" (also "City Fund") is the fund established by the City under ordinance to receive payments from various permittees for future use in the construction, repair, and reconstruction of facilities for

which payment into the fund has been made, or for replacement facilities that mitigate the burden on or need for such original facilities.

"Transfer" includes sell, convey, assign or alienate all or a portion of an interest in property.

**2. Permittee's Obligations to Create HOA; Record Documents and Covenants; Provide Certification; and Make Fund Payment Prior to Transferring Interest in, or Selling any Lots.**

a. Incorporation of Association; Recording Documents and Covenants. Permittee shall incorporate an Association consisting of all Lot Owners in the Property which Association shall be charged with maintaining and repairing common areas within the Property, of which the Facility/ies shall be a part. Permittee shall create covenants for the Association which comply with this Agreement and which include Exhibit A to this Agreement, the Mandatory Covenant Requirements Regarding Stormwater Facilities. At the same time as the final plat for the Property is filed in the Office of the Register of Deeds for Durham County, and before Transfers of any interest in or Lots within the Property, Permittee shall take the following actions and complete the following additional filings in the Register of Deeds for Durham County, in the order indicated below:

- i. Finalize this Agreement by inserting the appropriate plat book and page references for the just-recorded plat for the Property in Section 1(b) above and adding any other missing entries or information;
- ii. Record this Agreement, properly executed by all Parties so as to bind the Permittee, the Association, and the Property;
- iii. Finalize the covenants for the Property by inserting the plat book and page numbers for the Property, the deed book and page numbers for this Agreement, and necessary language to incorporate Exhibit A of this Agreement into the Covenants;
- iv. Record the properly executed Covenants for the Property.

b. Delivery of Recorded Documents and Attorney Certification. Within 5 working days of completing the steps described in 2(a) above, and prior to Transferring any interest in the Property, including but not limited to the sale of any Lot, and prior to applying for and receiving any building permits for any Lot, Permittee shall deliver to the City's Stormwater Services Division an attorney's certification, as described below, and copies of the properly executed and recorded documents described in (a) above – i.e., the recorded plat, the recorded Agreement, and the recorded covenants for the Property. The attorney certification shall be from an attorney licensed to practice law in the State of North Carolina, in form and substance acceptable to the City that certifies to the following:

- i. That the Association was properly formed and incorporated in North Carolina in accordance with law;
- ii. That this Agreement and the Covenants for the Property have been executed by all legally necessary parties, in a legally binding manner, and are binding on the parties and the Property;
- iii. That the Agreement contains necessary references to the recorded plat for the Property, and that the Covenants for the Property contain necessary references to the recorded plat and the recorded Agreement, and incorporate Exhibit A of this Agreement;
- iv. That recordation of instruments described above occurred in the following order – plat, then Agreement, then Covenants;
- v. that the Covenants for the Property require membership for each Lot within the Property (except commonly owned Lots which may be excepted) and a rational allocation of the cost of maintenance, repair, and reconstruction of the Facility/ies amongst all such member Lots exists;
- vi. that the mandatory dues amounts for the two stormwater funds have been included in the Covenants;
- vii. that the Covenants provide a process for assessing the Lot Owners for delinquent payments and for additional payments for stormwater costs and enforcing such assessments and that the City is named as a third party with the right to enforce such assessments in lieu of the Association if necessary.

c. Payment to Stormwater Facility Replacement Fund. At the time of delivery of the recorded documents and certification, Permittee shall pay the estimated Stormwater Facility Replacement Fund payment, prescribed by City Requirements, which shall equal 25% of the estimated cost of constructing the Facility/ies, calculated in accordance with

City Requirements. This payment is not intended as a substitute for security that ensures the construction of the Facility/ies, which security may be required at such point in the development process as is specified in City Requirements. Per City Requirements, Permittee may be required to supplement the payment into the Fund Payment upon completion of the Facility/ies, or may be refunded a portion of such payment.

d. Payment of Permit Fee(s). At the time of delivery of the recorded documents and certification, Permittee shall pay the Stormwater Permit Fee for each of the Facility/ies, as prescribed by City Requirements.

### **3. Permittee's Obligations with Regard to Construction of Facility/ies; Denial of Permits in the Event of Noncompliance.**

- a. Construction, Inspection, Certification, and Submission of As-Built Construction Drawings. Permittee shall complete the actions described below for the Facility/ies on such timetable as is specified in City Requirements.
- i. Construct the Facility/ies in accordance with the construction plans approved by the Department of Public Works and take various steps toward final completion, and finally complete the Facility/ies, in accordance with such timetables and/or deadlines specified in City Requirements;
  - ii. Provide any additional security required by the Director to ensure construction of the Facility/ies if the deadlines described in (i) above have not been met, or in the event that Permittee becomes insolvent or otherwise unable to proceed with construction on the Property<sup>1</sup>;
  - iii. Cause the Facility/ies to be finally inspected and certified by the engineer who designed the Facility or by such other registered NC Professional Engineer acceptable to the City, in accordance with the City's BMP Certifying Engineer Program and other City Requirements<sup>2</sup>;
  - iv. Submit to the Department of Public Works reproducible as-built drawings and as-built calculations acceptable to the Department<sup>3</sup>;
  - v. Complete an operation and maintenance manual for each Facility in accordance with City Requirements<sup>4</sup>;
  - vi. Submit records to the City Stormwater Services Division in accordance with City Requirements documenting construction costs for the Facility, including but not limited to all costs of construction administration<sup>5</sup>;
  - vii. Complete any repairs to the Facility/ies that may be directed in the discretion of the Director;

In the event Permittee does not satisfactorily complete the foregoing obligations on such timetable as may be specified by the City, the City may withhold any permits and approvals related to development of the Property or any Lot and may pursue any other remedy available under this Agreement or applicable law<sup>6</sup>.

b. Transfer of Site and Facility to Association. After satisfactory completion of the steps described in subsection (a) above, Permittee shall Transfer the Site(s) to the Association(s) which shall, thereafter, become responsible for inspection, maintenance, and reconstruction of the Facility/ies as set forth in Section 4 below. Permittee's transfer of the Site prior to completion of the steps described in (a) above shall not relieve Permittee of its obligations under this Agreement.

c. Discharge of Permittee's Obligations; Recordation of Release. Following satisfactory performance of its obligations under this Agreement, Permittee may request a release from the Director in writing. Within 30 calendar

<sup>1</sup> See Letter to Industry 12-18-08

<sup>2</sup> See the following BCE Program Documents: (1) BMP Certifying Engineer Program; (2) General Certification Assessment Checklist; (3) General As-Built and Construction Certification; (4) Geotechnical Certification

<sup>3</sup> See footnote 2 above

<sup>4</sup> See footnote 2 above, as well as the Owner's Maintenance Guide for Stormwater BMPs Constructed in the City of Durham

<sup>5</sup> See General As-Built and Construction Certification (Item 12)

<sup>6</sup> See footnote 1 above

days of receipt of such request and receipt of all accompanying documentation and certifications required by the City, upon determination that Permittee has satisfied its obligations, the Director shall issue a release confirming that Permittee has fulfilled its obligations under this Agreement and is discharged from such obligations<sup>7</sup>. Permittee shall record such release at the Durham County Register of Deeds. In its discretion, the City may record any documents indicating that construction of the Facility/ies has been completed and/or that Permittee is released from the obligations of this Agreement.

d. Notice to Lot Owners and Successors in Interest to Permittee. Recordation of this Agreement gives notice to all Lot Owners that building permits may be withheld for Lot(s) in which they have an interest in the event of Permittee noncompliance with Section (2) above or this Section (3). In addition, it gives notice to all Persons who may be considered "Permittee" under the definitions herein that approvals and permits related to development of the Property may be withheld in the event of Permittee noncompliance with this Agreement<sup>8</sup>.

#### **4. Association/Lot Owner Responsibility for Completed Facility/ies**

a. Association's/Lot Owners' Continuing Permanent Responsibility for Facility/ies. Upon release of Permittee as described in Section 3(c) above, or if no release occurs, then upon official notification to the Association from the City, the Association, or in the event there is no legally effective Association, the Lot Owners collectively shall be responsible for inspection, maintenance, repair, reconstruction, and funding for the completed Facility/ies, and shall comply with all City Requirements. The Association shall be responsible for performing these obligations whether or not the Site and/or the Facility/ies have been legally transferred to the Association. The obligations of the Association, or the Lot Owners in the absence of an Association, are further described below.

b. Filing of Responsible Officer for Association with City. The Association file with the City's Department of Public Works, and update such filing yearly, the name and contact information of a responsible officer or agent for the Association who is familiar with the maintenance and upkeep of the Facility. The filing shall also be updated when there is a change in the responsible officer or agent<sup>9</sup>.

c. Maintenance. The Facility/ies shall be maintained in compliance with City Requirements as they may change from time to time. At the time of recordation of this Agreement these are generally found in the City of Durham's "Owner's Maintenance Guide for Stormwater BMPs Constructed in the City of Durham" and in the operation and maintenance manual prepared specifically for the Facility/ies at the time of completion of construction. (As of October 1, 2007, the current version of the "Owner's Maintenance Guide for Stormwater BMPs Constructed in the City of Durham" can be viewed at or downloaded from the City's website at: [http://www.durhamnc.gov/departments/works/pdf/draft\\_owners\\_maint\\_guide.pdf](http://www.durhamnc.gov/departments/works/pdf/draft_owners_maint_guide.pdf))<sup>10</sup>

d. Inspections/Reports to City. In accordance with City Requirements, the Association shall cause the Facility/ies to be inspected (i) annually; (ii) after events that cause visual damage to the Facility; and (iii) upon notification by the Director. The inspection shall be performed by a registered North Carolina Professional Engineer or a North Carolina Registered Landscape Architect certified by the City and shall be in compliance with City Requirements. The inspection shall occur annually during the month in which acceptance of the as-built certification for the Facility/ies occurred, or at such other time as may be reasonably directed by the City. The inspection shall be

<sup>7</sup> See BMP Certificate of Acceptance

<sup>8</sup> See Letter to Industry 12-18-08

<sup>9</sup> See BMP Owner's Financial Disclosure Certification Statement

<sup>10</sup> See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol; (2) Owner's Maintenance Guide for BMPs Constructed in the City of Durham

reported to the City as further described below<sup>11</sup>.

e. Repair and Reconstruction. The Association shall repair and/or reconstruct the Facility/ies as it determines is necessary, and, additionally, as may be directed by the City, to allow the Facility/ies to function for its/their intended purpose, and to its design capacity. The Association shall provide written reports regarding major repair or reconstruction to the City in accordance with City Requirements<sup>12</sup>.

f. Budget Line Items for Stormwater Expenses. The dues of the Association shall include amounts for upkeep and reconstruction of the Facilities and charges for these purposes shall be included in the dues charged to Lots from the point that Lots are charged dues for other common purposes. The Association shall maintain two (2) separate funds in its budget for the Facility/ies. The first ("Inspection and Maintenance Fund") shall be for routine, yearly Facility expenditures -- annual inspections, maintenance, and routine repairs -- and the funds for this purpose may be maintained as part of the Association's general account. The second ("Major Reconstruction Fund") shall be dedicated to a separate, increasing reserve fund that will build over time and provide money for major repairs to and eventual reconstruction of the Facility/ies. The Major Reconstruction Fund shall be maintained in an account that is separate from the HOA's general account as described below. At a minimum, the Association shall earmark \_\_\_\_ annually from its collected dues for the Inspection and Maintenance Fund and \_\_\_\_ annually for the Major Reconstruction Fund. These minimum amounts shall be increased annually by 3% per year over the prior year's amount. The Association may set a higher amount in its discretion. The Association shall set a higher amount if the Director determines, in his/her reasonable discretion that additional amounts are necessary to provide for adequate inspections and maintenance or for an adequate reserve fund. The Association shall set dues at a sufficient amount to fund each of the two line items in addition to the Association's other obligations. The Association may compel payment of dues through all remedies provided in the Covenants for the Property or otherwise available under law<sup>13</sup>.

g. Assessments/Liens. In addition to payment of dues, each Lot shall be subject to assessments by the Association for the purpose of fulfilling the Association's obligations under this Agreement. Such assessments shall be collected in the manner set forth in the covenants. As allowed under NCGS §47F, or successor statutes, or, for condominiums, as allowed under NCGS 47C, or successor statutes, all assessment remaining unpaid for 30 days or longer shall constitute a lien on the Lot. Such lien and costs of collection may be filed and foreclosed on by the Association. In addition, the Association's rights may, in the discretion of the City, be exercised by the City, as a third party beneficiary of this Agreement and/or as Attorney in Fact for the Association, as provided in Section 7 of this Agreement, without limitation as to other rights the City may have under this Agreement and under law.

h. Stormwater Expenditures Receive Highest Priority. Notwithstanding any contrary provisions of the Association's recorded covenants, to the extent not prohibited by law, the inspection, maintenance, repair, and replacement/reconstruction of the Facility/ies shall receive the highest priority (excluding taxes and assessments and other statutorily required expenditures) of all Association expenditures.

i. Separate Account for Major Reconstruction Fund; Requirements for Withdrawal. The Association shall maintain the major reconstruction fund for the Facility/ies in an account maintained at a bank or other similar institution and such account shall be separate from the Association's general account. The Association shall use the Major Reconstruction Fund only for major repairs and reconstruction of the Facility/ies. The Association's bylaws shall require that signatures of two Association officers are required for withdrawal of funds from the Major Reconstruction

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<sup>11</sup> See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol; (2) BMP Maintenance Certifier Program; (3) Certification; (4) Conditional Certification; (5) EMR Submittal Form; (6) Inspection Report Form(s)

<sup>12</sup> See the following BMC Program Documents: (1) Conditional Certification; (2) EMR Submittal Form; (3) BMP Owner's Financial Disclosure

<sup>13</sup> See the following BMC Program Documents: (1) BMP Owner's Financial Disclosure Certification Statement; and (2) Annualized Maintenance Costs for BMPs

Fund<sup>14</sup>.

j. Engineer Report prior to Major Repairs and Reconstruction. Prior to withdrawing funds from this account, the Association shall (i) obtain a written report from an engineer approved in accordance with City Requirements regarding repairs or reconstruction needed and approximate cost of such repair or reconstruction; and (ii) submit such report to the Director and notify the Director of the major repairs or reconstruction to be undertaken on the Facility, the proposed date, and the amount to be withdrawn from the Major Reconstruction Fund. In the event of an emergency withdrawal and expenditure of funds from the Major Reconstruction Fund may be made after telephone notification to the Stormwater Services Division of the Department<sup>15</sup>.

k. Annual Reports to City. The Association shall provide to the Director annual reports in substance and form as set forth in City Requirements. This annual report shall be signed by an officer of the Association, who shall attest as to the accuracy of the financial information in such report. If prepared by a professional management company hired to manage the Association's affairs, the report shall so indicate. The Officer's signature and attestation shall be notarized. At a minimum each report shall include:

- i. the annual Facility/ies inspection report described in Section 4(d) above<sup>16</sup>;
- ii. a bank or account statement showing the existence of and balance in the separate Major Reconstruction Fund at the time of submission of the report<sup>17</sup>;
- iii. other information regarding the Facility/ies as may be required under City Requirements<sup>18</sup>;
- iv. the amount of Association dues being set aside for the current year for each of the two purposes – the Inspection and Maintenance Fund, and the Major Reconstruction Fund<sup>19</sup>.

l. Facility/ies to Remain with Association; Lot Owners' Liability. To the extent not prohibited by law, the Facility/ies shall remain the property of the Association and may not be conveyed by the Association. In the event the Association ceases to exist or is unable to perform its obligations under this Agreement, all Lot Owners with the exception of those Lots owned by the Association shall be jointly and severally liable to the City to fulfill the Association's obligations under this Agreement. Such Lot Owners shall have the right of contribution from other owners with each Lot's proportional obligation calculated as set forth in the Covenants for the Association. In addition, the City may exercise the remedies described in Section 7 of the recorded Agreement. This Agreement and all other remedies provided by law.

m. No Public Adoption. The City's exercise of rights under this Agreement or under City Requirements does not constitute adoption of the Facility/ies by the City. City regulation is not intended to impede or prohibit the Association or Lot Owners from taking all necessary actions to maintain, repair, and reconstruct the Facility/ies so that they function safely and perform the function for which they were created.

## **5. Stormwater Facility Replacement Payment and Fund.**

The Permittee's payment to the Stormwater Facility Replacement Fund ("City Fund") shall be calculated, retained, used, and disbursed as provided by ordinance and other City Requirements. The Fund shall be used for the purchase, design, construction, reconstruction, and repair of stormwater facilities that have paid into the Fund or for stormwater facilities that replace or mitigate the need for those facilities for which monies have been paid into the Fund.

<sup>14</sup> See BMP Owner's Financial Disclosure Certification Statement

<sup>15</sup> See EMR Submittal Form

<sup>16</sup> See Inspection Report Forms

<sup>17</sup> See BMP Owner's Financial Disclosure Certification Statement

<sup>18</sup> See footnote 17 above

<sup>19</sup> See footnote 17 above

**6. City Easement/Right of Entry/No City Responsibility**

Permittee, the Association, and the Lot Owners hereby grant the City a permanent easement over the Site and Facility/ies for inspection, construction, repair, and other work on the Facility. The terms and conditions regarding the use of such easement may be expanded but not limited by recorded declarations regarding the use of such easements. Permittee, the Association, and the Lot Owners also grant the City a permanent nonrevocable right of ingress, egress, and regress over and across all public or private easements on the Property, including but not limited to private roads, for inspection, construction, repair, and other work on the Facility/ies. Permittee and Lot Owners grant the City a permanent nonrevocable right of ingress, egress, and regress over individual Lots solely for response to emergencies, public nuisances, or the imminent threat thereof. In this Section, "the City" includes employees, agents, and contractors of the City. The grant of these rights does not obligate the City to exercise them or to take any other action.

**7. Remedies for Violations; Lien on Property; Future Obligations Secured.**

a. City Performance of Work. If the Permittee and/or Association fail to perform their obligations under this Agreement, the City may send notice to the party(ies) in default demanding performance. If the defaulting party does not cure such default within sixty (60) days from the date notice is mailed, the City may, in the reasonable discretion of the Director, enter the Property and the Site and perform some or all of the defaulting party's obligations under this Agreement. In an emergency the City may perform such work prior to the expiration of the 60 day period. Nothing in this Agreement shall be interpreted to require the City to undertake a party's obligations under this Agreement.

b. Repayment of City. The defaulting party shall reimburse the City for its costs in inspecting, constructing, repairing, and reconstructing the Facility/ies. Such costs may include the cost of administration and overhead. The City shall send written notice to the party in default requesting reimbursement for the costs of the work. The defaulting party shall pay all such costs within sixty days of the date he notice is mailed. Any costs not paid to the City within the sixty day period shall be delinquent, and the defaulting party shall be subject to all legal remedies available to the City under law or equity.

c. Debt Owed in the Event of Nonpayment; Lien. In the event that the defaulting party does not reimburse the City as required in subsection (b) above, the party shall owe the following additional amounts: interest on such costs at the rate of eight percent (8%) per annum, collection costs, late payment charges of three hundred dollars (\$300) for the first ninety (90) days of default and five hundred dollars (\$500) additional charge for each ninety (90) day period thereafter, and reasonable attorneys' fees. The debt may be collected by the City using any remedy authorized by law or in this Agreement. In addition, the debt or a proportional amount thereof calculated using a methodology reflecting number of lots, value of Property, types of uses, or a combination of these factors, as determined in the City's sole discretion, shall be a lien against the Property and the Lots and may be collected as unpaid taxes in accordance with N.C.G.S. 160A-193 or other statutory provisions, with notice as may be required by law. The City may add the debt to any utility bills owed and utilize any remedy provided by law or ordinance for unpaid utility bills. The City may also foreclose on the liens.

d. Right to Act for the Association. In addition to all of the remedies set forth herein, if the defaulting party is the Association and payment has become delinquent as described in paragraph (b) the City may, with additional 30 days' written notice to the Association, pursue the right of the Association to repay the amount due, as calculated in accordance with the Articles of Incorporation, Covenants, and Bylaws of the Association. The Association hereby designates, constitutes and appoints the City as the Association's Attorney in Fact for the express and limited purpose of assessing and pursuing collection of such amounts under the conditions and limitations as set forth herein. This appointment is coupled with an interest and is irrevocable as long as this Agreement is in effect.

e. Withholding of Permits. In the event the defaulting party is the Permittee, the City may withhold any or



all permits or other approvals necessary to complete development of the Property or any Lot until such time as Permittee fulfills such obligations<sup>20</sup>.

## **8. Release of Lien by Certificate.**

a. Duty to Furnish a Certificate. On the request of any of the Persons described in subsection (a) (i) below, and upon the condition prescribed by subsection (a) (ii) below, the Director shall furnish a written certificate stating the amount of any monetary liabilities owed pursuant to this Agreement by a party to this Agreement or a Lot Owner.

- i. *Who May Make Request* -- Any of the following Persons shall be entitled to request the certificate:
  - A. An owner of the Property;
  - B. An occupant of the Property;
  - C. A Person having a lien on the Property;
  - D. A Person having a legal interest in the Property, including but not limited to a Lot Owner;
  - E. A Person having a contract to purchase or lease the Property or Lot or a Person that has contracted to make a loan secured by the Property or Lot;
  - F. The authorized agent or attorney of any Person described in subdivisions (a) (i) (A) through (E) above.

ii. *Duty of Person Making Request* -- The City's duty to furnish a certificate is contingent upon the requester providing the following, as may be specified by the Director: the name of the party regarding whom the certificate is requested; the property regarding which the certificate is requested (the Property as a whole, some portion of the Property, or a Lot); recordation information for the pertinent Agreement; recordation information for pertinent covenants, if the request concerns an Association or Lot; a copy of the first page of this Agreement; a copy of the first page of the Association's Covenants; and payment of the required fee for a certificate.

b. Reliance on the Certificate. When a certificate has been issued as provided in subsection(a) above, all monetary liabilities owed pursuant to this Agreement that have accrued against the Site or the Property or the Lot identified in the request for the period covered by the certificate shall cease to be a lien against the identified property for which the certificate has been issued, except to the extent of monetary liabilities stated to be due in the certificate, as to all Persons obtaining such a certificate and their successors in interest who rely on the certificate by doing one or more of the following:

- i. Paying the amount of monetary liabilities stated therein to be owed;
- ii. Purchasing or leasing a portion of the Property; or
- iii. Lending money secured by all or part of the Property.

c. Oral Representations not Effective. Without limiting the effect of this Section, no oral statement made by any City employee as to the amount of monetary liabilities that are owed by the Permittee or a Lot Owner, or are a lien on all or a portion of the Property pursuant to this Agreement, shall be legally effective, or shall bind the City.

**9. Warranty.** Permittee covenants with the City that Permittee is seized of the Property in fee simple, has the right to convey the same in fee simple, that title is free and clear of all encumbrances, except for those identified in the Opinion of Title furnished to the City as a requirement prior to the City's execution of the Agreement, and that Permittee will warrant and defend the title against the lawful claims of all persons except for the exceptions stated in such opinion of title.

**10. Notice.** When a notice is required or permitted by this Agreement, it shall be given in writing to the City

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<sup>20</sup> See Letter to Industry 12-18-08

delivered to the Director of Public Works, 101 City Hall Plaza, Durham, NC 27701, FAX: (919) 560-4316  
or upon the Permittee, at (insert name and address of Permittee)

\_\_\_\_\_. Written notice shall be sent by first class mail, and in addition by facsimile, if a fax address can be determined. Parties' addresses may be changed by sending a notice of the new address attached to a copy of the first page and execution pages of this Agreement.

**11. No Waiver of Breach.** If the City fails to enforce or waives any breach of any obligation or covenant in this Agreement, that failure to enforce or waiver shall not constitute a waiver of any other or future breach of the same or any other obligation or covenant. The City's failure to exercise any right under this Agreement shall not constitute a waiver of that right.

**12. Agreement Binding.** This Agreement and Covenants shall bind the Association in perpetuity and shall bind Permittee and its successors in interest until the City releases such Permittee as described in Section 3 above. A Lot Owner's obligations and liabilities under this Agreement shall cease upon conveyance of his/her Lot.

**13. Amendment of Agreement.** Amendments to this Agreement shall be valid only if made in writing and signed by the parties, provided that the Permittee's signature shall not be required if the Permittee has ceased to exist or has been released by the City as provided in Section 3 above. The City Manager may, on behalf of the City, amend this agreement without approval by the City Council.

**14. Covenants Herein to Run with the Property.** The obligations of this Agreement are a perpetual servitude and appurtenant to and running with the Property, -- the Site, and the Lots.

**15. Successors and Assigns.** The designation of Permittee, Association and the City shall also include their heirs, assigns, and successors in interest.

**16. Liability; Indemnification.**

a. The approval by the City or any employee of the City of any plans or of any work referred to in this Agreement shall not create any liability in the City or its officers, officials, or employees for the plans or the work. Nothing herein is intended to release any other Person for any liability for those plans or work.

b. The performance by the City or any employee of the City of any work allowed under this Agreement shall not create any liability in the City or its officers, officials, or employees for the work. Nothing herein is intended to release any other Person for any liability for that work.

c. The Permittee, prior to release from the City, and the Association, after the Facility/ies are constructed shall indemnify the City and its officers and employees for any costs to the City or such Persons resulting from any claims regarding the construction, operation, maintenance, repair, and/or reconstruction of the Facility/ies, or the failure to perform the same. Costs shall include but are not limited to the expense of counsel chosen by and acceptable to the City.

**17. Remedies not Exclusive.** The provision of specific remedies in this Agreement is not limiting and the City shall have all remedies available in law and in equity to enforce the provisions of this Agreement against the Permittee, the Association, and/or the Lot Owners, and their respective heirs, personal representatives, successors, and assigns.

**18. No Third Party Rights.** Except as may be explicitly provided in this Agreement, this Agreement is not intended to be for the benefit of any Person other than the parties hereto, the Lot Owners, and their heirs, personal representatives, successors, and assigns.

**19. Governmental Functions; Superseding Regulations.** Nothing contained in this Agreement shall be deemed or construed to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions. In addition, this Agreement does not restrict or prevent the application of ordinances or other enactments which may supplement or supersede the provisions of this Agreement.

**20. Choice of Law and Forum.** This Agreement shall be deemed made in Durham County, North Carolina and shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this Agreement shall be the North Carolina General Court of Justice, in Durham County. Such actions shall neither be commenced in nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

**21. Interpretation of this Agreement.** Unless the context requires otherwise, the singular includes the plural, the plural includes the singular, and the neuter includes the masculine and feminine. The captions and titles are for convenience only, and are not to be used to interpret the Agreement. The words "include" and "including" mean, respectively, "include but not limited to", and "including but not limited to".

**22. Severability.** Invalidation of any term or provision in this Agreement by a court of competent jurisdiction shall not invalidate the remaining terms and provisions of this Agreement which may be enforced, at the election of the City, as set forth herein.

IN WITNESS WHEREOF, the parties hereto have respectively set their hands and seals, or if corporate, have executed this under seal by their proper officers, to be effective as of the date of its recordation in the Durham County Register of Deeds.

**XYZ, Inc.**

ATTEST:

Signed: \_\_\_\_\_

Signed: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_ Secretary

Title: \_\_\_\_\_ President

[Affix Corporate Seal]

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, a notary public for said county and state, certify that \_\_\_\_\_ personally appeared before me this day, and acknowledged he or she is \_\_\_\_\_ Secretary of **XYZ, Inc.**, a corporation, and that by authority duly given and as the act of the corporation, the foregoing contract with the City of Durham was signed in its name by its \_\_\_\_\_ President, whose name is \_\_\_\_\_ and attested by him/herself as its said Secretary or Assistant Secretary.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Notary Public

My commission expires:  
\_\_\_\_\_

**HOA, Inc.**

ATTEST:

Signed: \_\_\_\_\_

Signed: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_ Secretary

Title: \_\_\_\_\_ President

[Affix Corporate Seal]

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

I, \_\_\_\_\_, a notary public for said county and state, certify that \_\_\_\_\_ personally appeared before me this day, and acknowledged he or she is \_\_\_\_\_ Secretary of **HOA, Inc.**, a corporation, and that by authority duly given and as the act of the corporation, the foregoing contract with the City of Durham was signed in its name by its \_\_\_\_\_ President, whose name is \_\_\_\_\_ and attested by him/herself as its said Secretary or Assistant Secretary.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
Notary Public

My commission expires:  
\_\_\_\_\_

ATTEST:

**CITY OF DURHAM**

By: \_\_\_\_\_  
City Clerk  
[Affix Municipal Seal]

\_\_\_\_\_  
City Manager

**STATE OF NORTH CAROLINA**

**COUNTY OF DURHAM**

I, \_\_\_\_\_, a notary public in and for the County of Durham, North Carolina certify that \_\_\_\_\_ personally appeared before me this day and acknowledged that he/she is City Clerk of the **CITY OF DURHAM**, a municipal corporation, and that by authority duly given and as the act of the City, the foregoing contract was signed in its name by its \_\_\_\_\_ City Manager and attested by himself/herself as its said City Clerk or Deputy City Clerk.

Witness my hand and notarial seal, the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

My commission expires:  
\_\_\_\_\_

\_\_\_\_\_  
Notary Public

EXHIBIT A  
TO  
STORMWATER FACILITY AGREEMENT AND COVENANTS

MANDATORY PROVISIONS FOR DECLARATION OF RESTRICTIVE COVENANTS

**ARTICLE (fill in)**

**Obligations Regarding Stormwater Facilities**

The Property includes one or more stormwater management facilities (hereafter “Facility/ies”) that is/are the perpetual responsibility of the Association. Such Facilities are the subject of a Stormwater Facility Agreement and Covenants (“Stormwater Agreement”) between Declarant, the Association, and the City of Durham (“the City”) that is binding on the Association. The Stormwater Agreement is recorded at DB \_\_\_\_\_ Page \_\_\_\_\_, Durham County Register of Deeds. The Property subject to that Stormwater Agreement is the “Property” referred to in this Article. The Stormwater Facilities must be maintained in accordance with City Requirements, which include all ordinances, policies, standards, and maintenance protocols and in accordance with the recorded Stormwater Agreement. In particular the City’s current “Owner’s Maintenance Guide for Stormwater BMPs Constructed in the City of Durham” (available at the time of recording this document at [http://www.durhamnc.gov/departments/works/pdf/draft\\_owners\\_maint\\_guide.pdf](http://www.durhamnc.gov/departments/works/pdf/draft_owners_maint_guide.pdf) and the operation and maintenance manual prepared specifically for the Facility/ies contain requirements that apply to the Association’s Facilities<sup>21</sup>.

Nothing in the remaining Article of these Restrictive Covenants filed by Declarant as part of this Declaration or any subsequent modifications of this Declaration may reduce the Association’s or Lot Owners’ obligations with regard to the Facility/ies. Such additional covenants may increase the obligations or provide for additional enforcement options.

The Stormwater Facility/ies and their location are as follows: *(Insert below the description of Facilities and Plat Book citation and Lot identification from Section 1(b) of the Stormwater Agreement)*

In addition to the above obligations, the Association’s obligations with regard to the Facilities are:

1. **Inspections/Routine Maintenance.** In accordance with City Requirements, the Association shall cause the Facility/ies to be inspected i) annually; and, ii) after major storm events cause visual damage to the Facility; and iii) upon notification from the City to inspect. The inspection shall be performed by a registered North Carolina Professional Engineer or a North Carolina Registered Landscape Architect certified by the City who shall document those things mandated under City Requirements. The inspection shall occur annually during the month in which the Facility/ies as-built certification was accepted by the City, which month may be determined through contact with the City of Durham Department of Public Works, Stormwater Division. The inspection shall be reported to the City as further described below<sup>22</sup>.

<sup>21</sup> See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol; (2) Owner’s Maintenance Guide for BMPs Constructed in the City of Durham

<sup>22</sup> See the following BMC Program Documents: (1) BMP Annual Maintenance Certification Protocol, (2) BMP Maintenance Certifier Program, (3) Certification, (4) Conditional Certification, (5) EMR Submittal Form, (6) Inspection Report Form(s)

2. **Repair and Reconstruction.** The Association shall repair and/or reconstruct the Facility/ies as it determines is necessary, and, at a minimum, as set forth in City Requirements or as directed by the City to allow the Facility/ies to function for its intended purpose, and to its design capacity. The Association shall provide written reports regarding major repair or reconstruction to the City in accordance with City Requirements<sup>23</sup>.

3. **Stormwater Budget Line Items & Funding.** The dues of the Association shall include amounts for upkeep and reconstruction of the Facilities which shall be included in dues charged to Lots or members from the point that Lots or members are charged dues for other common purposes. The Association shall maintain two (2) separate funds in its budget for the Facility/ies. The first, the "Inspection and Maintenance Fund," shall be for routine inspection and maintenance expenditures and shall be used for annual inspections, maintenance, and minor repairs. The funds for this purpose may be maintained as part of the Association's general account. The second fund, the "Major Reconstruction Fund," shall be a separate, increasing reserve fund that will build over time and provide money for major repairs to and eventual reconstruction of the Facility/ies. The Major Reconstruction Fund shall be maintained in an account that is separate account from the Association's general account as described below. At a minimum, the Association shall, annually, earmark \_\_\_\_\_ from its collected dues for the Inspection and Maintenance Fund and \_\_\_\_\_ for the Major Reconstruction Fund. These minimum amounts shall be increased annually by 3% per year over the prior year's amount. The Association may set a higher amount in its discretion, or if directed by Durham Director of Public Works after an examination of the Facility/ies. The Association shall set dues at a sufficient amount to fund each of the two line items in addition to the Association's other obligations. The Association may compel payment of dues through all remedies provided in these Covenants or otherwise available under law<sup>24</sup>.

4. **Assessments/Liens.** In addition to payment of dues, each Lot shall be subject to assessments by the Association for the purpose of fulfilling the Association's obligations under this Article and under the Stormwater Agreement. Such assessments shall be collected in the manner set forth in these Covenants. As allowed under NCGS §47F, or successor statutes, or, for condominiums, as allowed under NCGS 47C, or successor statutes, all assessment remaining unpaid for 30 days or longer shall constitute a lien on the Lot. Such lien and costs of collection may be filed and foreclosed on by the Association. In addition, the Association's rights may, in the discretion of the City, be exercised by the City, as a third party beneficiary of the recorded Stormwater Agreement and/or as Attorney in Fact for the Association, as provided in Section 7 of the recorded Stormwater Agreement.

5. **Stormwater Expenditures Receive Highest Priority.** Notwithstanding any contrary provisions of the covenants of which this Article is a part, to the extent not prohibited by law, the inspection, maintenance, repair, and replacement/reconstruction of the Facility/ies shall receive the highest priority (excluding taxes and assessments and other statutorily required expenditures) of all Association expenditures.

6. **Separate Account for Major Reconstruction Fund. Engineer's Report.** The Association shall maintain the Major Reconstruction Fund for the Facility/ies in an account separate from the Association's general account. The Association shall use the Fund only for major repairs and reconstruction of the Facility/ies. No withdrawal shall be made from this fund unless the withdrawal is approved by two Association officials who shall execute any documents allowing such withdrawal. Prior to withdrawing funds from this account, the Association shall (i) obtain a written report from an engineer approved in accordance with City Requirements regarding repairs or reconstruction needed and approximate cost of such repair or reconstruction; and (ii) submit such report to the Director of the City's Department of Public Works, and notify the Director of the repairs or reconstruction to be undertaken on the Facility, the proposed date, and the amount to be withdrawn from the Major Reconstruction Fund. In the event of an emergency, withdrawal and expenditure of funds may be made after telephone notification to the Stormwater Services

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<sup>23</sup> See the following BMC Program Documents: (1) Conditional Certification; (2) EMR Submittal Form; (3) BMP Owner's Financial Disclosure

<sup>24</sup> See the following BMC Program Documents: (1) BMP Owner's Financial Disclosure Certification Statement; (2) Annualized Maintenance Costs for BMPs

Division of the Department<sup>25</sup>.

7. **Annual Reports to City.** The Association shall provide to the City annual reports in substance and form as set forth in City Requirements. This annual report shall be signed by an officer of the Association, who shall attest as to the accuracy of the information in such report. If prepared by a professional management company hired to manage the Association's affairs, the report shall so indicate. The Officer's signature and attestation shall be notarized. At a minimum each report shall include:

- i. the annual Facilities inspections report described in section (1) above<sup>26</sup>;
- ii. a bank or account statement showing the existence of the separate Major Reconstruction Fund described in Section (6) above and the balance in such fund as of the time of submission of the report<sup>27</sup>;
- iii. a description of repairs exceeding normal maintenance that have been performed on the Facility/ies in the past year, and the cost of such repairs<sup>28</sup>;
- iv. the amount of Association dues being set aside for the current year for each of the two stormwater funds – the Inspection and Maintenance Fund and the Major Reconstruction Fund<sup>29</sup>.

8. **Facility/ies to Remain with Association; Lot Owners' Liability.** To the extent not prohibited by law, the Facility/ies shall remain the property of the Association and may not be conveyed by the Association. In the event the Association ceases to exist or is unable to perform its obligations under this Agreement, all Lot Owners as defined in the Stormwater Agreement referenced above, excluding the Lots owned by the Association, shall be jointly and severally liable to fulfill the Association's obligations under this Agreement. Such Lot Owners shall have the right of contribution from other owners with each Lot's pro rata share being calculated as Lot Owner's proportional obligations are otherwise defined in these Covenants. The City may also exercise the rights described in Section 7 of the recorded Stormwater Agreement and other remedies provided by law.

9. **City Rights; Liens Against Owners.** In addition to rights granted to the City by ordinance or otherwise, the City shall have the following rights, generally summarized below, and more explicitly set forth in the Stormwater Agreement referenced above:

- a. Direct the Association in matters regarding the inspection, maintenance, repair, and /or reconstruction of the Facility/ies;
- b. If the Association does not perform the work required by ordinance, by these covenants, and by the Stormwater Agreement referenced above, do such work itself, upon 30 days' written notice to the Association.
- c. Access the Facility/ies for inspection, maintenance, and repair, crossing as necessary the lot(s) on which the Facility/ies are located and all other private and public easements that exist within the Property subject to these covenants.
- d. Require reimbursement by the Association of the City's costs in inspecting, maintaining, repairing, or reconstructing the Facility/ies, as provided in the Stormwater Agreement referenced above.
- e. Enforce any debts owed by the Association as described in the Stormwater Agreement referenced above against Lot Owners if such debts are not fully paid by the Association. The

<sup>25</sup> See BMP Owner's Financial Disclosure Certification Statement

<sup>26</sup> See Inspection Report Forms

<sup>27</sup> See BMP Owner's Financial Disclosure Certification Statement

<sup>28</sup> See footnote 27 above

<sup>29</sup> See footnote 27 above



debt may be allocated to Lot Owners as provided in the other sections of these Covenants, and may be made a lien on each owner's property, may be added to each owner's utility bills, and may result in foreclosure, as provided in Section 7 of the Stormwater Agreement referenced above.

10. **No Dissolution.** To the extent not prohibited by law, the Association shall not enter into voluntary dissolution unless the Facility is transferred to a person who has been approved by the City and has executed a Stormwater Agreement with the City assuming the obligations of the Association. Under the Stormwater Agreement referenced above, individual Lots and Lot Owners continue to be liable for the Facility/ies in the event the Association is dissolved without a new Stormwater Agreement between the City and a responsible party that is assuming the Association's obligations.

11. **No Amendment.** Without the prior written consent of the City, which may be given by the Durham City Manager, and notwithstanding any other provisions of these Restrictive Covenants, the Association may not amend or delete this Article with the exception of supplementing its provisions in a more detailed manner to better describe members' or Lot Owners' obligations regarding each other.

12. **Stormwater Agreement Supersedes.** The Stormwater Agreement referenced above supersedes any limiting provisions contained elsewhere in other Articles of these Covenants. However, such Articles may supplement the obligations of the Association as set forth in that Agreement, and/or the obligations of and remedies against individual Lot Owners or members bound by these Covenants.